

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In Re: *Petition of ATM Discount Communications, Inc. for Arbitration with BellSouth Telecommunications, Inc.*

Docket No. 01-00302

RESPONSE TO MOTION TO DISMISS

ATM/Discount Communications, Inc. ("Discount"), submits the following response to the Motion to Dismiss filed by BellSouth Telecommunications, Inc. ("BellSouth").

BellSouth has filed a Motion to Dismiss the arbitration petition filed by Discount on the grounds that Discount is not a "telecommunications carrier" as that term is used in Sections 251 and 252 of the Federal Telecommunications Act. Therefore, according to BellSouth, Discount is not entitled to seek arbitration under the Act.

The Act defines a "telecommunications carrier" as "any provider of telecommunications service." 47 U.S.C. § 153(44). Telecommunications service "means the offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46).

Discount is, of course, actively offering local telephone service to customers in Memphis and Nashville. As a matter of federal law, there is no doubt that Discount is a "telecommunications carrier" under the Act and therefore entitled to proceed with this arbitration.

BellSouth's initial filing also included a number of inaccurate and prejudicial statements about Discount that have nothing to do with the issues raised in the arbitration. The import of these allegations is that Discount is not properly certified to provide telephone service in Tennessee.

The state law issues raised by BellSouth have no apparent relevance to this federal arbitration proceeding. In any event, the circumstances surrounding the certification of

Discount are fully explained in the attached letter, dated May 31, 2001, written in response to an inquiry from the TRA staff. In sum, "Discount Communications," a sole proprietorship, obtained a resale certificate in 1998, and then merged into another corporation. The merged company then changed its name to "ATM/Discount Communications, Inc.," the petitioner in this case. Both the TRA staff and BellSouth were informed of these changes. It is unclear whether the merger required Discount to file a petition to transfer the certificate pursuant to T.C.A. § 65-4-113, but Discount has offered to file such a petition if requested by the staff.

On June 19, 2001, BellSouth filed a reply to Discount's letter to the staff. Unlike the company's initial filing, the reply seems to accept Discount's explanation of the circumstances regarding the certification issue. The reply suggests, however, that if, in fact, the staff requests that Discount file a transfer petition, the TRA might not approve the petition because of Discount's alleged lack of "sufficient financial abilities" to provide service.

Given the current financial crisis among CLEC's, some of which are in bankruptcy, BellSouth's suggestion that the TRA should revoke a certificate of a CLEC because of financial problems cannot be taken seriously. Furthermore, as BellSouth is aware, Discount is making daily payments into an escrow account in order to remain current on its charges from BellSouth. and is also making monthly payments of \$8,000 to BellSouth to pay off, over time, Discount's prior debt. Therefore, to the extent Discount's financial ability to provide service is, or ever becomes, an issue in this or any other docket, it is self-evident that the company does, in fact, have the financial means to provide service.

The Motion to Dismiss is frivolous and should be denied.

Respectfully submitted,



Henry Walker (No. 000272)
BOULT, CUMMINGS, CONNERS & BERRY, PLC
414 Union Street, Suite 1600
P.O. Box 198062
Nashville, Tennessee 37219
(615) 252-2363

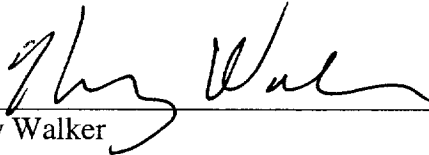
Attorneys for Discount Communications

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being forwarded via facsimile to:

Guy M. Hicks
BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300

on this the 22nd day of June, 2001.



Henry Walker



BOULT ■ CUMMINGS
CONNERS ■ BERRY PLC

Henry Walker
(615) 252-2363
Fax: (615) 252-6363
Email: hwalker@boultoncummings.com

May 31, 2001

David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: Petition of ATM Discount Communications, Inc. for Arbitration with
BellSouth Telecommunications, Inc.
Docket No. 01-00302

Dear David:

In response to your letter of May 30, 2001, I am sending you a copy of a letter I wrote in January concerning the relationship between Discount Communications and ATM/Discount Communications, Inc. I believe the letter answers all of your questions except the one concerning the filing of a \$20,000 surety bond. I will contact the company and get back to you on that.

In sum, Discount Communications merged with Air Time Management, Inc., effective January 1, 1999. Following the merger, the merged entity changed its name to ATM/Discount Communications, Inc. When Ed Hayes informed the TRA staff of the merger, he was informed that he needed to file a name change petition with the TRA. He did that, and the name change was approved. Unfortunately, the name change request omitted the "Inc." as did the TRA order approving the name change. Mr. Hayes also informed BellSouth of the corporate reorganization and was told that the merger would have no effect on the resale agreement between BellSouth and Discount and that BellSouth would continue to honor the agreement.

Therefore, to answer your questions: the correct name of the certified reseller in Tennessee is ATM/Discount Communications, Inc. There was no request filed to transfer the certificate from Discount to the merged entity because the TRA staff advised Mr. Hayes that a "merger" was not a "transfer" and that the transfer statute did not apply.

Although the agency has not, to my knowledge, issued any rules or orders on the subject, it is my understanding from conversations with the staff that the Legal Division may have recently changed its position as to what constitutes a "transfer" of a certificate and now considers, for example, a change in the controlling ownership of a carrier to require the filing of a transfer petition even if the corporate entity itself does not change. I do not know if the Staff would also apply this interpretation to telephone resellers which, as you know, are not required

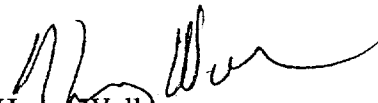
May 31, 2001
Page 2

to go through a hearing to obtain a certificate and are generally less regulated than facilities-based carriers. Nevertheless, if the staff now believes that the merger of Discount and Air Time Management, Inc. requires the filing of a transfer petition, *nunc pro tunc*, please let me know.

I will let you know about the bond as soon as I have talked to the company

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 
Henry Walker

HW/nl

BOULT
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& BERRY_{PLC}

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January 3, 2001

Neal Labovitz, Esq.
1633 State Line Rd. West
Southaven, MS 38671

Dear Neal:

Since our last meeting with Judge Brown, I have researched the relationship between Discount Communications and ATM/Discount Communications, Inc. from the standpoint of federal and state regulatory law. I have also included in this letter some additional information about the interconnection agreement (sometimes called a resale agreement) between Discount and BellSouth Telecommunications, Inc. and how that agreement may be affected by the merger of Discount into ATM/Discount Communications, Inc. Here is what I have learned:

1. On April 20, 1998, Discount Communications, a sole proprietorship under the control of Edward Hayes, obtained a certificate from the Tennessee Regulatory Authority to resell local telephone service in Tennessee. A copy of that certificate is attached. Discount also executed an interconnection agreement with BellSouth which was subsequently filed with and approved by the TRA.¹
2. On February 17, 2000, Discount merged into Air Time Management, Inc. According to the merger documents, the two entities had been effectively operating as one company since the beginning of 1999. The documents also state that the merger became effective retroactively to January 1, 1999. Following the merger, the surviving entity, Air Time Management, Inc., changed its name to ATM/Discount Communications, Inc. Mr. Hayes states that he explained the merger to his account representative at BellSouth and to staff members at the TRA. According to Mr. Hayes, the BellSouth employees told him that it was not necessary to take any action

¹ Under the federal Telecommunications Act, every interconnection agreement must be submitted to and approved by the appropriate state regulatory commission. See 47 U.S.C. § 252(e).

regarding the parties' existing interconnection agreement. Similarly, the TRA staff told Mr. Hayes that he needed only to file a request with the TRA to change the name of Discount Communications to ATM/Discount Communications, Inc. A copy of Mr. Hayes' subsequent request is attached. As you can see, Mr. Hayes' request incorrectly describes the new name of the merged entity as "ATM/Discount Communications." The "Inc." is missing. On February 29, 2000, the TRA issued an order approving the requested name change. A copy of the order is attached. Because of Mr. Hayes' error in his petition, the order also omits the "Inc." from the new name.

3. Under Tennessee law, T.C.A. § 65-4-113, no public utility may "transfer" its certificate to any other entity without approval of the Authority. Assuming that the TRA staff correctly understood the transaction between Discount and AirTime Management, Inc., the staff apparently determined that the merger of Discount into Air Time Management, Inc. did not constitute a "transfer" of Discount's certificate.²
4. Whether or not ATM/Discount Communications, Inc. has the right under Tennessee law to assume the contract between Discount and BellSouth, ATM/Discount, or any other state certified telephone company, does have the right under federal law to "opt in" to Discount's existing interconnection agreement with BellSouth at any time. Under Section 252(i) of the Telecommunications Act, BellSouth is required to "make available" any interconnection agreement to which BellSouth is a party to "any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. 252(i).
5. I have also located a second, more recent interconnection agreement between BellSouth and "Discount Communications, Inc." signed on

² If, on the other hand, the staff had decided that Section 113 did apply, Discount and Air Time Management, Inc. would have been required to demonstrate the "suitability, financial responsibility, and capability" of the transferee to "perform efficiently the utility services to be transferred." Since the two entities apparently operated as one company since the beginning of 1999, it seems likely that the TRA, if requested, would have found Air Time Management, Inc. just as qualified as Discount to operate under Discount's resale certificate.

Neal Labovitz, Esq.
January 3, 2001
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February 23, 2000.³ Unlike the first agreement, the second contract provides both for the resale of BellSouth's service as well as the purchase of BellSouth's network elements. As a certified reseller, ATM/Discount has the right to buy BellSouth's services for the purpose of resale. In order to purchase network elements, however, ATM/Discount must obtain a certificate as a "competitive local exchange carrier ("CLEC") from the TRA. ATM/Discount does not have such a certificate. This new interconnection agreement has not been filed with the TRA.

I hope this answers some of the questions raised during our meeting with Judge Brown.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:


Henry Walker

HW/

³ I will send you a copy of the second agreement (without attachments) by overnight mail.

Company ID: 00128102
Discount Communications
6647 Steeplechase Circle
Memphis, TN 38141

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, TN April 20, 1998

IN RE: CASE NUMBER: 98-00080

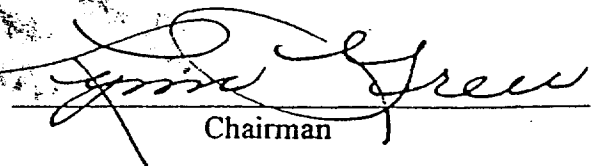
Application for Authority to Provide Operator Services and/or Resell
Telecommunications Services in Tennessee Pursuant to Rule 1220-4-2-.57.

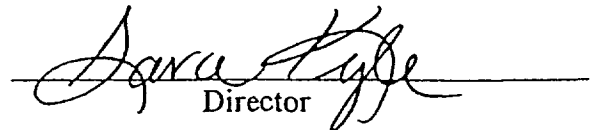
---ORDER---

This matter is before the Tennessee Regulatory Authority upon the application of the above-mentioned company for certification as a reseller or telecommunication operator service provider in Tennessee. The TRA considered this application at a Conference held on March 24, 1998 and concluded that the applicant has met all the requirements for certification and should be authorized to provide operator services and/or resell telecommunications services on an intrastate basis.

IT IS THEREFORE ORDERED:

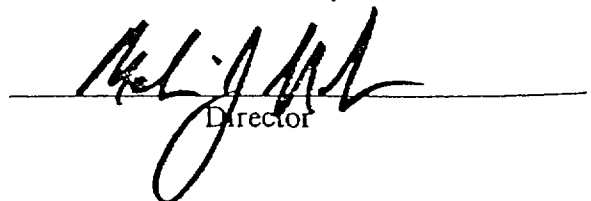
1. That the above-mentioned company is issued a Certificate of Convenience and Necessity as an operator service provider and/or reseller of telecommunications services for state-wide service in Tennessee as specified in its application on file with the Authority.
2. That said company shall comply with all applicable state laws and TRA rules and regulations.
3. That this order shall be retained as proof of certification with this Authority, and may be used to obtain appropriately tariffed service and billing arrangements from Authority authorized telecommunications service providers.


Chairman


Director

ATTEST:


Executive Secretary


Director

Discount Communications

"Your Complete Telecommunications Provider"

3798 Park Ave
Memphis, TN 38111-4684
Phone... (901) 843-6070
Toll Free 888 589-6505
Fax... (901) 327-2809

00 FEB 14 AM 11 14

EXECUTIVE SECRETARY

00-00110
128102

To: Tennessee Regulatory Authority, Executive Secretary

Dear Mr. David Waddell,

This letter is to serve as notice that Discount Communications has undergone a name change. The new name for Discount Communications is ATM/Discount Communications. The address for ATM/Discount Communications is 3798 Park Ave. Memphis, TN. 38111. Please allow all previous and future records reflect this change.

Thanking You in Advance,


Edward Hayes
President

"Your Complete Telecommunications Provider"

POSTED
2-14-00
00-00110

PAID

Company ID: 128121
ATM Discount Communications
3798 Park Ave.
Memphis, TN 3811101

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, TN February 29, 2000

IN RE: CASE NUMBER: 00-00110
Discount Communications to change its name to ATM/Discount Communications
---ORDER---

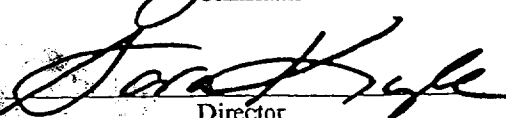
This matter is before the Tennessee Regulatory Authority upon the petition of Network Telephone, Inc. to change its company name. The TRA considered this request at their regularly scheduled Conference held on February 29, 2000 and concluded that the applicant has met all the TRA requirements for changing its name.

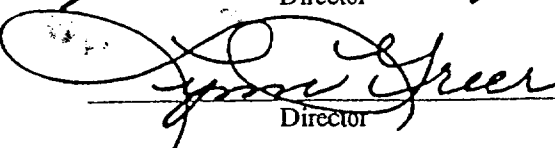
Pursuant to § T.C.A. 65-4-113,


IT IS THEREFORE ORDERED:

1. That the petition of Discount Communications to change its name to ATM/Discount Communications is approved.
2. That ATM/Discount Communications holds a Certificate of Public Convenience and Necessity to provide resold telecommunications services in Tennessee as specified in its application on file with the Authority.
3. That said company shall comply with all applicable TRA rules and regulations.
4. That this order shall be retained as proof of certification with this Authority, and may be used to obtain appropriately tariffed service and billing arrangements from Authority authorized telecommunications service providers.


Chairman


Director


Director

ATTEST: 
Executive Secretary